

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

State of Minnesota, by John B.
Lennes, Jr., Commissioner,
Department of Labor and Industry,
Complainant,

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FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

v.

Carlton County Highway Department,
Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles on February 23, 1995 at the Carlton County Courthouse in Carlton, Minnesota. The hearing was held pursuant to a Notice of and Order for Hearing and Notice to Employees dated September 6, 1994.

Susan C. Gretz, Assistant Attorney General, Office of Attorney General, Suite 900, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, appeared on behalf of the Complainant, John B. Lennes, Jr., Commissioner, Minnesota Department of Labor and Industry (hereinafter also referred to as "Complainant" or "Commissioner"). James M. Ross, Jr., Assistant County Attorney, Carlton County Attorney, Room 202 Courthouse, P.O. Box 300, Carlton, Minnesota 55718, appeared on behalf of Carlton County Highway Department (hereinafter also referred to as "Carlton County" or the "County"). The record closed on June 1, 1995, when the last authorized memorandum was filed.

NOTICE OF APPEAL RIGHTS

Pursuant to Minn. Stat. § 182.669, subd. 1 (1992), this decision and order is a final decision unless appealed. Pursuant to Minn. Stat. § 182.664, subd. 5 (1992), this decision and order may be appealed to the Minnesota Occupational Safety and Health Review Board by the Employer, Employee, or their authorized representatives or any party within thirty (30) days following service by mail of this decision and order. On appeal, the Board has authority to revise, confirm, or reverse this decision and order. The Board may schedule a hearing for the purpose of taking oral argument before its decision is issued.

STATEMENT OF ISSUES

Whether it is appropriate to issue OSHA citations to Carlton County when it was not the employer of the employees whose conduct caused the OSHA citations.

Based upon all the files, records and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. In 1993, Carlton County Highway Department proposed to reconstruct a portion of County State Aid Highway 3 in Carlton County between County State Aid Highway 4 and West Chub Lake Road (hereinafter referred to as the "Highway 3 Project"). In general, the road construction project proposed to bring the road more into compliance with State requirements by widening the road and making the grade more level by eliminating hills. Approximately a three-mile portion of the highway would be reconstructed. Kern and Tabery, Inc., of Wadena, Minnesota, was selected to serve as the General Contractor for the road construction project (hereinafter also referred to as the "General Contractor").

2. A preconstruction conference was held on July 9, 1993 at the Carlton County Courthouse. The purpose of the conference was to discuss how the project would proceed. Ex. 4. County personnel, the General Contractor and all the utilities (except Minnesota Power) that might be affected by the project were present. The Preconstruction Conference Report identifies two persons who have responsibility for "safety of workers" and "(safety officer, active program, rules, inspect, train, OSHA)". The two persons identified as safety officers were: Milt Hagen for Carlton County, and Brad Kern for the General Contractor.

3. County employee Blaine Pearson was assigned as the County Representative to the project. Ex. 4. Blaine Pearson is supervised by Milt Hagen, Assistant County Engineer, and Wayne Olson, County Engineer. As County Representative, Mr. Pearson was at the construction site every day to make certain that the construction work was being done according to the design and construction specifications contained in the contract.

4. The General Contractor hired several subcontractors to work on the Highway 3 Project. There were nine different utility companies who may at one time or other be at the construction site when their property was involved. The utilities might also hire subcontractors. At any given time, there were several employers whose employees may be working at the construction site. The utility companies involved include the following: Great Lakes Gas, U.S. West, Williams Pipeline Company, Northern Minnesota Utilities, Northern Natural Gas and Lakehead Pipeline.

5. A high voltage electric power line owned and operated by Minnesota Power is located in the right-of-way of County Highway 3. The high voltage power lines are both overhead and underground.

6. Work on the Highway 3 Project began on July 19, 1995. On that day, an employee of subcontractor Ed Pappenfuss Excavation, Duane Moench, brushed a tree that he was moving into an energized power line. Two days later, Duane Moench hit a

downed guy and tripped a transformer breaker. In eight days between July 19 and July 28, Duane Moench caused four strikes on power lines. The strikes were not intentional. Working on the project was difficult because of the close proximity of the power lines and very limited working room. Exhibit 9. Some of the power lines were hidden by brush and were difficult to see. Exhibit 16.

7. On July 28, 1995, Duane Moench of Ed Pappenfuss Excavation, told Mr. Pearson that he tripped a circuit breaker on a transformer when he hit a power line while using the backhoe. Mr. Pearson did not speak to the General Contractor about this, and he did not contact his supervisors, Milt Hagen or Wayne Olson, to inform them about this.

8. Minnesota Power was concerned about the four strikes to its power lines. Three of the strikes on July 19, 21 and 28, 1993 required that Minnesota Power dispatch a technician to replace either conductors or fuses. Exhibits 22, 23 and 24. On July 29, 1993, Greg Rindal, Supervisor of Corporate Safety and Industrial Hygiene for Minnesota Power, contacted Milt Hagen to express concern about the power line strikes. Greg Rindal also expressed the concern that the power line strikes presented the potential for a fatal accident. T. 31. Mr. Hagen informed Greg Rindal that he would speak with the County Project Representative, Blaine Pearson, and with the General Contractor's foreman, Brad Kern.

9. Milt Hagen went to the construction site on July 29, 1993 after his discussion with Greg Rindal. Milt Hagen spoke with Blaine Pearson. Mr. Pearson told Milt Hagen that he learned of a power line strike the day before when Duane Moench told him about it. Milt Hagen also spoke with Brad Kern, the General Contractor's foreman. At that time, Brad Kern assured him that he had spoken with the backhoe operator, and had told him about the dangers to his safety and others regarding power lines. Brad Kern told Milt Hagen that the strikes were not intentional and that "working on this project is difficult because of the close proximity of the lines and the very limited working room."

10. Construction site personnel, including the General Contractor's foreman, did not appear receptive to Minnesota Power inquiries about maintaining the ten-foot clearance from overhead electrical conductors. Because of the lack of cooperation at the construction site and the concern for worker safety at the construction site, Greg Rindal proposed a meeting that would include the General Contractor, Minnesota Power and Carlton County representatives. T. 31. As of July 29, 1993, Greg Rindal understood that Milt Hagen would be arranging a meeting at a suitable time and place. T. 33. Milt Hagen indicated in his County Engineer Log for July 29, 1993 that a meeting was desired by Minnesota Power. Ex. 9. However, after the discussion with Brad Kern, Milt Hagen believed that Minnesota Power's concern had been answered and that the concern had been responded to. He stated as follows:

With the assurances from Brad that he has talked to his operator about the hazards in working around energized

power lines, this matter has been responded to and incidents of this nature should not happen again on this project.

Exhibit 9. No meeting was scheduled.

11. Approximately one week after Milt Hagen's discussion with Greg Rindal, an employee was injured on the Highway 3 Project site as a result of a power line strike. On August 3, 1993, the injured employee was working with another employee to remove a bulldozer that had become stuck in the mud. Exhibits 6, 25 and 26. The injured employee walked up to the person operating the backhoe, and touched the metal casing around the backhoe itself. Because the upper crane was in contact with the power line, electricity traveled through the backhoe and to the employee. The employee suffered burns on his hands and feet and was taken to the hospital. Exhibits 6, 25 and 26.

12. Ronald Gomes, Senior Safety Investigator with Minnesota OSHA, investigated the accident. Mr. Gomes' investigation involved speaking with the General Contractor, subcontractors and county personnel involved in the construction project. T. 177, 180. Based on these conversations, Mr. Gomes determined that applicable OSHA standards had been violated. Mr. Gomes cited Carlton County because the County had ultimate authority to stop or change or modify conditions on the construction site. T. 182. That determination is based on Minnesota OSHA policy with respect to "multi-employer" work sites. T. 183.

13. Based on his investigation, Mr. Gomes recommended issuance of a three-item citation against Carlton County. T. 184, 195, 198; Exhibits 15, 18 and 20. Citations were also issued to two other contractors on the worksite. T. 182. The first citation is for violation of 29 C.F.R. § 1926.550(a)(15)(i), which requires that equipment not be operated within ten feet of a power line of 50 kv or less. T. 184-86. The second citation references 29 C.F.R. § 1926.21(b)(2), which requires an employer to instruct each employee in the recognition and avoidance of unsafe conditions and the applicable regulations. T. 195. The third citation references 29 C.F.R. § 1926.20(b)(1) and (2), which requires frequent and regular inspections of a construction job site. T. 198. For each of the Citations, Carlton County was issued a fine of \$3,250.00 or a total of \$9,750.00.

14. The parties to this proceeding stipulated to the correct determination of the penalty figures for each of the citations under consideration in this proceeding. T. 194.

15. Although the construction work itself is left to the contractors, Carlton County personnel worked at the construction site from time to time. Those persons included a survey crew, the Project Representative and the Assistant County Engineer who all worked with the contractor to complete the project. Only the Project Representative, Blaine Pearson, was present at the construction site every day. In general, the purpose of county personnel at the construction site was to ensure that the

contractor was meeting the contract specifications in completion of the project. T. 84. Blaine Pearson was at the construction site full-time around the time of the accident. T. 153. Milt Hagen, the county Safety Officer for the project, had the responsibility or duty to, from time to time, conduct a cursory review of safety on the project site. It was his responsibility to identify any unsafe conditions for workers and to call these problems to the General Contractor's attention. T. 98. At no time during the Highway 3 Project did Milt Hagen identify safety problems connected with the high voltage power lines to the General Contractor or ask that the General Contractor include, as a part of safety training, training with respect to overhead power lines. T. 100, 125.

16. County Engineer Wayne Olson was not aware of any training county employees had received regarding the dangers from overhead power lines. T. 100. Although county employees had been trained in the hazards of electricity, possibility of shock, electrical cords and electrical panels, they had not been trained generally with respect to the danger of overhead power lines. T. 125.

17. The day following the accident on August 4, 1993, a meeting was held between Minnesota Power, the contractors and Carlton County personnel, including County Engineer Wayne Olson, County Assistant Engineer Milt Hagen and Blaine Pearson. At that meeting, a plan was proposed to prevent the recurrence of contact with high voltage power lines. Minnesota Power proposed to shut down the power in certain areas, and in areas where the power could not be shut down, the power lines would be raised to avoid contact. In certain areas a bulldozer instead of a backhoe would be used where the lines were not de-energized. T. 104-05.

18. The Minnesota Standard Specifications For Construction were incorporated as a part of the contract between Carlton County and the General Contractor. The following provisions are relevant:

1501
Authority of the Engineer

* * *

The engineer will have authority to suspend the work either wholly or in part, due to failure of the contractor to correct conditions unsafe for the workmen or the general public; for failure to carry out provisions of the contract; for failure to carry out orders; for such periods as he deems necessary due to unsuitable weather; for conditions considered unsuitable for prosecution of the work; or for any other conditions or reasons deemed to be in the public interest.

* * *

1507
Utility Property and Service

* * *

When work near electrical power lines is required, the Contractor, at his option, may elect to work with the lines energized or may, at no expense to the Department, make arrangements with the power company to temporarily shut off the power, to temporarily insulate the line(s), to bypass the power from the work area, or to make other arrangements necessary for a safe workplace.

* * *

Construction operations adjacent to utility property shall not be commenced until arrangements satisfactory to the utility owner have been made by the contractor for the protection of their property and continuation of service. Should any of the contractor's equipment come in contact with or damage utility property in any way even though there may be no apparent evidence of breakage or harm, the contractor shall promptly notify the proper authorities and cooperate with them in determining damage and restoring interrupted services as may be needed. Where contact is made with a utility, operations should be suspended immediately, and the site vacated, until it has been determined by the utility owner that it is safe to resume operations.

Exhibit 3.

19. From July 28, the date that Blaine Pearson was informed by Duane Moench about a power line strike, the County knew or should have known workers were being exposed to unsafe working conditions at the construction site. From July 29, the date that Greg Rindal spoke with Milt Hagen, Carlton County knew or should have known that the General Contractor was failing to comply with the contract requirement that construction work cease when there is a power line strike and work not be commenced until the electric utility declare conditions were safe for workers. Carlton County failed to enforce the provisions of the contract relating to power line strikes.

20. Carlton County exercised its authority to force the General Contractor to comply with the terms and conditions of the contract with respect to certain other matters such as erosion at the construction site and proper signage for traffic control at the construction site. However, Carlton County failed to exercise its authority with respect to the power line strikes and worker safety. Ex. 8, 14.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has jurisdiction in this matter pursuant to Minn. Stat. §§ 182.661, subd. 3 and 14.50 (1992).

2. Respondent Carlton County received timely and proper notice of the charges against it and the date, time, and location of the hearing. Complainant has complied with all relevant, substantive and procedural requirements of statute and rule.

3. Respondent Carlton County is an "employer" as that term is defined by Minn. Stat. § 182.651, subd. 7 (1992). Zorgdrager v. State Wide Sales, Inc., 489 N.W.2d 281, 284 (Minn. App. 1992).

4. As relevant to this proceeding, the federal OSHA standards have been adopted as standards for use in Minnesota pursuant to Minn. Stat. § 182.65, subd. 2f and Minn. Rules pt. 5205 (1993).

5. In a multi-employer work site where there are conditions that do not comply with OSHA standards that employees have access to, it is appropriate to site the work site employer who has supervisory authority to detect and abate a hazard created or controlled by those it supervises. Marshall v. Knutson Construction Co., 566 F.2d 596, 599 (8th Cir. 1977).

6. Respondent Carlton County was authorized by the contract with the General Contractor to suspend operations if conditions were unsafe for workers. According to the contract, the General Contractor was required to suspend operations when there was a power line strike and not resume operations until conditions were declared safe by the electric utility. The General Contractor failed to comply with this contract provision and the County failed to exercise its authority to suspend when it knew that the utility believed that conditions were unsafe for workers.

7. Because of Carlton County's supervisory authority over the work site, Carlton County could reasonably have been expected to detect and abate hazards associated with contacts with high voltage power lines. Because Carlton County failed to exercise its supervisory authority to prevent or abate the hazard prior to the accident, the subject citations are appropriate.

Based upon the foregoing Conclusions of Law, and for the reasons discussed in the Memorandum, the Administrative Law Judge makes the following:

ORDER

The Citations and Notifications of Penalties issued by Complainant on October 7, 1993 to Carlton County Highway Department are AFFIRMED.

Carlton County shall pay the total penalties of \$9,750.00 to Complainant forthwith. Pursuant to Minn. Stat. § 182.661, subd. 3 (1994), this Order constitutes the

final Order of the Commissioner of Labor and Industry. Under Minn. Stat. § 182.666, subd. 7, unpaid fines shall be increased by 25 percent if not paid within sixty (60) days after the fine becomes a final order and shall then accrue an additional penalty of 10 percent per month, compounded monthly until the fine is paid in full.

Dated this 26th of July, 1995.

ALLEN E. GILES
Administrative Law Judge

Reported: Taped and Transcribed.
Brennan & Associates, Court Reporters
by Jean A. Brennan, Court Reporter
One Appletree Square, Suite 202P
Bloomington, MN 55425

MEMORANDUM

Citations for violation of the OSHA standards identified in the Findings of this Report were given to two contractors who worked at the Highway 3 Project construction site. In addition to those contractors, the Commissioner has also cited Carlton County for the same standards violations. Carlton County does not dispute the facts that gave rise to the OSHA violations. Carlton County does not challenge that non-complying conditions existed at the construction work site, and does not deny that County personnel knew of the power line strikes prior to the accident. Carlton County essentially concedes all these issues and rests its entire case on whether it is appropriate to cite Carlton County as an employer. Carlton County argues that it was inappropriate to cite it as an employer when none of its employees, that is, no county personnel, were involved in the actual construction project. County personnel who were at the work site did not create or control the hazard. After consideration of this argument and the arguments presented by both parties, the Judge has concluded that the Citation was appropriate.

The Highway 3 Project was a "multi-employer" work site. Work sites at which several employers are working together present the possibility that one employer's conduct or failure to act affects the safety of employees of another employer. For this reason, and for purposes of giving due regard to the broad remedial purposes of the OSH Act, courts have held that an employer who has supervisory authority over other employees on the work site can reasonably be expected to prevent or abate a hazard created or controlled by those it supervises. Marshall v. Knutson Construction Co., 566 F.2d 596, 599 (8th Cir. 1977); Brennan v. OSHRC (Underhill Constr.), 513 F.2d 1032, 1038-39 (2d Cir. 1975); Gil Haugan, 7 O.S.H. Cas. (BNA) 2004, 2006, O.S.H. Dec. (CCH) ¶ 29,743, at 29,288 (Rev. Comm. 1979); Grossman Steel & Aluminum Corp., 4 O.S.H. Cas. (BNA) 1185, 1188, O.S.H. Dec. (CCH) ¶ 26,691, at 24,791 (Rev. Comm. 1976). A supervising employer's own employees need not be exposed or have access to a hazard for that employer to be found liable under the Occupational Safety and

Health laws. The supervisory relationship involved is often that of a general contractor to a subcontractor. In finding the general contractor liable for violations of subcontractors, these cases are predicated on the presumption that, by virtue of its supervisor capacity over the entire work site, the general contractor has sufficient control over its subcontractors to detect hazards and to require their abatement. Gil Haugan, 7 O.S.H. Cas. at 2006.

The County's overall supervisory authority is identified in Finding 18. The County exercised this authority with respect to other matters as identified in Finding 20. However, the County failed to act on information that employees at the site were being exposed to hazards. When the County was informed that the strikes were not intentional but because of "the close proximity of the lines and the very limited working room", the County should have recognized that the circumstances presented a continuing hazard. Because Carlton County had contractual authority over the General Contractor and had knowledge of previous power line strikes, it was reasonable to expect Carlton County to detect and abate the safety hazard.

The Judge's decision in no way is affected by the actions taken by Carlton County after the accident. On August 4, 1993, the day following the accident, Carlton County assembled the contractors and Minnesota Power for a meeting that planned ways of avoiding contacts with power lines in the future. The Commissioner asserts that it is reasonable to expect the County to abate the hazard of the overhead power lines because it exercised control over the contractor after the accident. The Commissioner asserts that this shows that the County had the ultimate supervisory control over the project and could have used this authority to act before the accident. The Judge believes that the Commissioner's assertion sends the wrong message: If you exercise authority after the fact to control a hazard, it shows that the authority was available and could have been exercised sooner. The Judge affirmatively rejects this assertion. The County's ultimate supervisory authority is contained in the language of the contract between the County and the General Contractor. That language is cited in the Findings. The County should be commended for the prompt action it took after the accident. To suggest otherwise does not serve the goal of accident prevention.

AEG